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IN THE
COURT OF APPEALS OF INDIANA

JUSTIN VANDERPOOL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A05-0707-CR-379
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No. 18C05-0702-FA-4

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

After Justin Vanderpool hit a police officer with a van and fled, he was convicted of attempted murder, a Class A felony;[1] battery resulting in bodily injury, a Class D felony;[2] resisting law enforcement as a Class A misdemeanor and as a Class D felony;[3] criminal recklessness, a Class A misdemeanor;[4] and deception, a Class A misdemeanor.[5] We vacate the convictions of criminal recklessness and resisting law enforcement as a Class D felony, but we affirm in all other respects.

FACTS AND PROCEDURAL HISTORY

On the evening of January 31, 2007, Barbara Pritchard went to Wal-Mart in Bucyrus, Ohio to purchase groceries. When she returned to her van with the groceries, Vanderpool and Ryan Binion approached her and asked for jumper cables. Pritchard told them she did not have jumper cables. Vanderpool and Binion asked for her cell phone, and she gave it to them, but they did not make a call. Pritchard then offered to buy jumper cables. Vanderpool grabbed her and told her he had a gun. He took her keys and purse, and left with Binion in her van. Pritchard went inside and made a report to the police.

Vanderpool and Binion drove through the night and arrived in Muncie, Indiana early the next morning. They stopped at Menards. According to Vanderpool, they intended to ask customers for gas money. They entered the store around 5:30 a.m., when the store is open only for contractors. David Huff, a Menards employee, noticed the men

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[1] Ind. Code §§ 35-41-5-1 and 35-42-1-1(1).
[2] Ind. Code § 35-42-2-1(a)(2)(A).
[3] Ind. Code § 35-44-3-3(a)(1), (a)(3), and (b)(1)(B).
[4] Ind. Code § 35-42-2-2(b)(1) and (c)(1).
[5] Ind. Code § 35-43-5-3(a)(6).

and did not recognize them as contractors he knew. Huff watched them wander around the store. They did not appear to be looking at the merchandise, and they left without purchasing anything. Huff watched them enter the van, which was parked ten to twenty spots from the door, although there were many closer spots available. When they did not leave, Huff called the police because he thought their behavior seemed suspicious.

Officers William Curtis and Herbert Holding responded to the call. Officer Curtis approached the driver's side, and Officer Holding approached the passenger side. Vanderpool told Officer Curtis his name was Justin Williams, he was from Ohio, and he was on a roadtrip. He did not produce a driver's license.

Binion also did not provide any identification. He told Officer Holding the van belonged to Vanderpool's grandmother. Officer Holding asked Vanderpool his grandmother's name. Vanderpool asked why he wanted to know and refused to answer. Officer Holding opened the glove box and found an insurance card.

Officer Holding walked toward the driver's side. When he was in front of the van, Vanderpool started the van. Officer Curtis attempted to perform an arm-bar on Vanderpool, and Officer Holding drew his weapon. Vanderpool took off at a high rate of speed with Officer Curtis still hanging on to his arm. The van struck Officer Holding, who rolled over the hood. The officers followed Vanderpool until he crashed and fled on foot. A police dog later found Vanderpool hiding in a wooded area.

DISCUSSION AND DECISION

1. Impartial Judge

Vanderpool argues he was denied a trial before a fair and impartial judge, citing the judge's comments at several points in the proceedings.

> A trial before an impartial judge is an essential element of due process. The impartiality of a trial judge is especially important due to the great respect that a jury accords the judge and the added significance that a jury might give to any showing of partiality by the judge. To assess whether the judge has crossed the barrier into impartiality, we examine both the judge's actions and demeanor. However, we must also remember that a trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial. "Even where the court's remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial." In short, defendant must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced defendant's case.

Timberlake v. State, 690 N.E.2d 243, 256 (Ind. 1997) (citations omitted).

A. Hearing on Motion to Withdraw

Defense counsel, Ross Rowland, filed a motion for reduction of bond on February 23, 2007. An entry in the chronological case summary for March 6, 2007 states, "Defendant's counsel appears and moves to withdraw the Motion for Bond Reduction due to defendant also being held on another charge."[6] (Appellant's App. at 213.)

On March 27, 2007, the court received a letter from Vanderpool. He claimed Rowland "ignored my concerns completely, coerced me to waive a bond reduction hearing I so badly needed, and upon our last meeting cursed me using foul language."

[6] Vanderpool was charged in Ohio with offenses stemming from the theft of Pritchard's van.

(*Id*. at 19.) He believed Rowland was "prejudice[d] towards my case and unwilling to adequately represent me." (*Id*.) He asserted he told Rowland he wanted a speedy trial, and Rowland ignored his request. Vanderpool questioned Rowland's competence and requested new counsel.

On April 3, 2007, Rowland filed a second motion for bond reduction, in which he indicated he mistakenly believed Vanderpool wanted to dismiss the original motion. The trial court denied the motion after a hearing on April 17, 2007.

On May 1, 2007, Rowland filed a motion to withdraw due to the accusations contained in Vanderpool's letter to the court. The court held a hearing, where the following exchange took place:

> COURT: Mr. Vanderpool, I received . . . your letter and I am offended by it. You said that . . . Mr. Rowland, whom I have known for these many years, who has done numerous cases in here, and you put this down that he isn't concerned . . . . ["]Coerced me to waive a bond reduction hearing I so badly needed. Cursed me using foul language." I've never heard the man swear in my life. What do you think you're doing here? I'm of the opinion that this is a blatant effort on your part to pull something on me and, if it is, you are going to be in jail a long time because I will not tolerate this type of thing. . . . He's represented cases in here that God himself couldn't have won and done his very best to try him. Who do you think you are? Why would he be prejudiced against you? He don't even know you. You're just another inmate. He does the very best he can. He's overloaded. He's got a hell of a lot of cases, more than he needs. And you think he is prejudiced against you?
>
> DEFENDANT: Your Honor . . .
>
> COURT: Where did you come up with that crap?
>
> DEFENDANT: Your Honor, I would not lie and . . .

COURT: You would not lie, sure. Look at you. Where are you? Oh God. Attempted Murder, Resisting Law Enforcement, Criminal Recklessness, Deception. Why would I believe you?

DEFENDANT: Your Honor, I need a responsible . . .

COURT: You . . . have a responsible attorney. It's the only one you're getting. You do not have a right to choose. Do you understand me?

* * * * *

DEFENDANT: Yes sir.

COURT: You better, because what you said here is slanderous to this man. I don't have to make him tolerate that at all. I ought to make you go to trial without an attorney. See how much of a chance you'd have. Put you away and keep you off the streets. This is ludicrous.

* * * * *

DEFENDANT: Your Honor.

COURT: Don't you even speak to me. This is the only attorney you are going to get. Now, if you don't want him, I'll take him off this case, but when I do, you'll go to Court without an attorney. Your chances then are little and none. Now do you understand that?

DEFENDANT: Yes sir.

COURT: . . . Now what do you want to do? You're not going to push me around. I've been here too long. I've been conned by experts and you think you're that smart, you aren't. You aren't going to con me. You're going to either go to trial without an attorney in which your chances are almost none, or you are going to have him try you because he is a competent attorney. He is a good man . . . . In the thousands of cases that he's handled in here, I have never, ever, ever, had anyone say that he has coerced a client. Now you know where that leaves you in all this?

(Tr. at 25-28) (errors in original). The judge then asked Vanderpool what he wanted to do, and Vanderpool stated he wanted to keep Rowland as his attorney.

Weighing the credibility of Vanderpool's allegations and determining whether new counsel should be appointed are within the trial court's discretion. *See Alexander v. State*, 449 N.E.2d 1068, 1071 (Ind. 1983) (indigent defendant does not have absolute right to counsel of own choosing; failure to permit appointed counsel to withdraw is reviewable for abuse of discretion). However, the judge's comments suggest he believed Vanderpool lacked credibility by virtue of the charges filed against him. The judge expressed personal offense, and his remarks displayed more than a "degree of impatience."

Although we disapprove of the judge's comments, Vanderpool has not established prejudice. Vanderpool argues he was prejudiced because "the judge did not even address his request for speedy trial." (Appellant's Br. at 11.) However, Vanderpool has not established he was not brought to trial within the appropriate timeframe.[7] Furthermore, Vanderpool received an opportunity to argue for a reduction in bond. Vanderpool expressed a desire to live with relatives in Michigan City and get a job there, but it was undisputed that Vanderpool would be turned over to authorities in Ohio if he bonded out. We can see no error or prejudice in the trial court's denial of his motion for bond

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[7] Ind. Crim. Rule 4(B)(1) provides a defendant who moves for an early trial shall be discharged if not brought to trial within seventy days, unless the delay is attributable to the defendant's motion for continuance or other act or to court congestion. In his statement of the case, Vanderpool notes, "Defendant requested Speedy Trial in a letter to the court filed March 27, 2007. . . . The court took no action with respect to Defendant's Request for Speedy Trial. Trial was scheduled to commence on June 12, 2007; 70 days from the date of the request would have been June 5, 2007." (Appellant's Br. at 6.) Vanderpool's letter was not a motion the court was required to consider. *See Edwards v. State*, 854 N.E.2d 42, 49 (Ind. Ct. App. 2006) (trial court was not required to consider *pro se* Crim. R. 4(C) motion because Edwards was represented by counsel), *aff'd on this issue* 866 N.E.2d 252 (Ind. 2007), *cert. granted on other grounds* 128 S. Ct. 741 (2007). Nor does Vanderpool address whether any delay is attributable to himself or court congestion.

reduction. Vanderpool has not identified any other ruling by the trial court that may have been influenced by the court's response to his letter.

B. Introductions to Jury

On the first day of the trial, the court made the following introductions:

> COURT: . . . Nate here, my friend, he's from the Sheriff's [D]epartment and the prosecutor is entitled to have one person sit with them [sic] during the trial. . . . Next is Judi. Her name is Judi Calhoun. She's the . . .
>
> STATE: Good morning.
>
> COURT: . . . deputy prosecutor. She'll be representing the State in this cause. Next, on this side, we have Mr. Ross Rowland . . .
>
> MR. ROWLAND: Morning.
>
> COURT: . . . who is defense counsel. He's a public defender. He's in this Court frequently and does this frequently and he will be defending this gentleman throughout the case. The next person is Mr. Vanderpool. He is the defendant and he is the man that is on trial here. . . .

(Tr. at 83-84.) Vanderpool asserts Nate was a witness and the trial court's comment enhanced his credibility. Vanderpool does not cite any testimony by Nate, and we found none in the record. Because Nate did not testify and, as discussed below, the evidence is overwhelming, Vanderpool cannot show he was prejudiced by the trial court's comments.

C. Dismissal of Juror

During *voir dire*, a potential juror indicated he had read about the case in the newspaper and had formed an opinion he could not set aside. The trial court dismissed him, stating, "I cannot believe that someone of intelligence can read a newspaper and form an opinion that is so strong that it could not be removed from their [sic] mind by

actually hearing the case here in the courtroom." (Tr. at 103.) This comment was not directed at either party and does not evince partiality.

D. Adjournment after First Day of Trial

At the conclusion of the first day of trial, the court stated, "Alright, its 5:00 . . . . Everybody ready to go home? Had enough for one day? Well, we'll get them tomorrow." (*Id*. at 250.) The court then admonished the jury not to read the newspaper, listen to television or radio, or discuss the case. Vanderpool argues "'We'll get them tomorrow' conveyed the judge's prejudice about the guilt of the defendant to the jury." (Appellant's Br. at 11.) The State argues the word "them" was meant to refer to the remaining witnesses, not the defense. The State's interpretation better fits the context. It is unlikely the trial court would express a desire to "get" the defendant and then proceed to instruct the jury on maintaining its impartiality or that the court would refer to Vanderpool with the plural pronoun "them." We conclude Vanderpool has not demonstrated he was prejudiced by any of the trial court's comments.[8]

2. Sufficiency of Evidence

Vanderpool argues the evidence was insufficient to support his conviction of attempted murder because the State did not prove he acted with specific intent to kill. *See Kiefer v. State*, 761 N.E.2d 802, 805 (Ind. 2002) ("In a prosecution for attempted murder, the State must show a specific intent to kill."). "Intent to kill may be inferred from the nature of the attack and the circumstances surrounding the crime. Additionally,

[8] The State argues Vanderpool did not preserve this issue for appeal because he did not object to any of the trial court's comments. Because Vanderpool was not prejudiced, he cannot establish fundamental error.

the trier of fact may infer intent to kill from the use of a deadly weapon in a manner likely to cause death or great bodily harm." *Id*. (citations omitted).

In reviewing sufficiency claims, we do not reweigh evidence or assess the credibility of witnesses. *Id*. at 803. "Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict, and we will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id*.

Vanderpool argues the evidence supports only an inference that he was attempting to flee. We disagree. Vanderpool had stolen the van he was driving. When confronted by the officers, he was unable to provide convincing answers. Officer Holding drew his weapon and aimed at Vanderpool. Although the police cars were parked behind the van, Officer Holding testified Vanderpool had room to back out of his parking space. Instead, he took off at a high rate of speed toward Officer Holding. Vanderpool suggests it is unlikely he would attempt to kill only one of the officers; however, Officer Curtis was hanging on to Vanderpool with both hands when the van took off, and as can be expected, he fell away after the van had moved a few feet. That Vanderpool decided to continue on instead of attacking Officer Curtis does not negate the inference he intended to kill Officer Holding. There was sufficient evidence of specific intent to kill.

3. Inconsistent Verdicts

Vanderpool argues the guilty verdicts of attempted murder and criminal recklessness are inconsistent because attempted murder requires specific intent and criminal recklessness does not. "When reviewing the consistency of jury verdicts, we

will take corrective action only when the verdicts are 'extremely contradictory and irreconcilable.'" *Jones v. State*, 689 N.E.2d 722, 724 (Ind. 1997) (quoting *Butler v. State*, 647 N.E.2d 631, 636 (Ind. 1995)).

Ind. Code § 35-42-2-2 provides in relevant part:

> (b) A person who recklessly, knowingly, or intentionally performs:
>
> (1) an act that creates a substantial risk of bodily injury to another person . . .
>
> commits criminal recklessness. . . .
>
> (c) The offense of criminal recklessness as defined in subsection (b) is:
>
> (1) a Class A misdemeanor if the conduct includes the use of a vehicle . . . .

If the jury concluded Vanderpool struck Officer Holding with the van knowingly or recklessly, it would be inconsistent to find he also acted with specific intent to kill. However, a conviction for criminal recklessness may also be predicated on an intentional act. The jury apparently concluded Vanderpool struck Officer Holding with the specific intent to kill him. That same act can rationally be considered an intentional act that created a substantial risk of bodily injury. Therefore, the verdicts are reconcilable.

4. Admissibility of Evidence

Prior to trial, the State filed a notice of intent to introduce 404(b) evidence. Ind. Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The State wanted to introduce evidence Vanderpool "stole the van he was driving and attempted to kidnap Barbara E. Pritchard from a Wal-Mart store in Bucyrus, Ohio immediately before coming to Muncie." (Appellant's App. at 31.) Vanderpool filed an objection, arguing the alleged events in Ohio had "no bearing on the alleged events in Indiana and can only be used to prejudice the jury." (*Id*. at 46.) Vanderpool also filed a motion *in limine* asking the court to exclude evidence of (1) ownership of the van, (2) investigations conducted by authorities in Ohio, and (3) references to Vanderpool possessing a weapon unless the State had proof he in fact possessed a weapon. The trial court ruled:

> Court determines the Motion in Limine was not filed in a timely manor [sic] and cannot be properly ruled upon before the start of the Jury trial. Court informs the parties objections will have to be brought up during the trial regarding issues in defendant's Motion in Limine. Regarding State's Notice of Intent to Introduce 404(b) Evidence and the defendant's Objection to said notice, the Court sustains the Objection in part. State may not refer to allegations of attempted kidnaping [sic].

(*Id*. at 50.)

Pritchard testified Vanderpool told her he had a gun and stole her van. Officer Curtis testified that "our dispatch found out through Ohio authorities that the subjects were armed and dangerous." (Tr. at 210.) Vanderpool did not object to this testimony.

"Rulings on motions in limine are not final decisions and, therefore, do not preserve errors for appeal." *Swaynie v. State*, 762 N.E.2d 112, 113 (Ind. 2002). Vanderpool did not object to the testimony when it was admitted; therefore, he must establish the admission of the evidence was fundamental error. "We will review an issue that was waived at trial if we find fundamental error, but to succeed, the defendant must

prove that the error was so prejudicial as to make a fair trial impossible." *Perry v. State*, 867 N.E.2d 638, 642 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 210 (Ind. 2007). Moreover, we afford a trial court broad discretion when ruling on the admissibility of evidence, and we will not reverse unless the decision is clearly against the logic and effect of the facts and circumstances. *Barrett v. State*, 837 N.E.2d 1022, 1026 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 995 (Ind. 2006).

The State argues the evidence was admissible to show Vanderpool's motive, intent, and absence of mistake. We agree. The evidence tends to show Vanderpool feared imminent arrest and the discovery of a weapon in the van. Without knowledge of Vanderpool's actions leading up to his arrival in Muncie, it would be difficult for the jury to accurately evaluate his mental state. That no gun was recovered does not negate the relevance of this evidence. Pritchard testified Vanderpool told her he had a gun, and Vanderpool could have disposed of it while fleeing the police. There was no error, much less fundamental error, in the admission of the evidence.

5. Double Jeopardy

Vanderpool argues his convictions of attempted murder and criminal recklessness placed him in jeopardy twice. The State concedes he cannot be convicted of both offenses, but argues judgment of conviction was not entered on the criminal recklessness charge.

After reading the jury's verdict and polling the jury, the trial court stated, "Alright, we'll enter a judgment of conviction on Counts 1 through 6," that is, all charges. (Tr. at

388.) The CCS entry for June 13, 2007 recites the jury verdict, then states, "Order of conviction is entered against the defendant." (Appellant's App. at 218.)

At sentencing, the prosecutor stated, "I believe that Count[] 3 [resisting law enforcement] and Count 5 [criminal recklessness] should merge with Count 1 [attempted murder] *for purposes of sentencing*." (Tr. at 390) (emphasis added). Defense counsel responded, "And I would concur with that your Honor." (*Id*.) After hearing and reflecting on the evidence, the trial court stated, "Now, as has been put on the record before, the Resisting Law Enforcement of 3, and the Criminal Recklessness of 5, are the ones that are actually included within the Attempted Murder. Do we all agree to that?" (*Id*. at 415.) Both parties indicated they agreed.[9]

The trial court entered judgment of conviction on all counts, and Vanderpool was convicted of both attempted murder and criminal recklessness. Although the trial court merged those offenses for purposes of sentencing, Vanderpool was placed in jeopardy twice. *See Jones v. State*, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004) ("A double jeopardy violation occurs when judgments of conviction are entered and cannot be remedied by the 'practical effect' of concurrent sentences or by merger after conviction has been entered."), *trans. denied* 822 N.E.2d 969 (Ind. 2004).

The State characterizes the statements at the sentencing hearing as an agreement that Vanderpool would be convicted of both offenses, but sentenced only for attempted murder, and therefore, any error was invited. We disagree. The prosecutor stated the

[9] The CCS entry for that date also states, "Parties agree that the charges for Count 3 and 5 are to be included with Count 1." (Appellant's App. at 218.)

offenses should be merged for purposes of sentencing. As the trial court had apparently already entered judgment of conviction, we cannot say counsel's subsequent statements indicated that Vanderpool agreed to be convicted of all charges.

Vanderpool does not argue on appeal that his conviction of resisting law enforcement as a Class D felony should be vacated; however, we *sua sponte* find the conviction violated Article 1, Section 14 of the Indiana Constitution. Under our constitution, we consider both the elements of the offenses and the actual evidence used to convict. "If the evidentiary facts establishing any one or more elements of one of the challenged offenses establishes the essential elements of the second challenged offense, double jeopardy considerations prohibit multiple convictions." *Alexander v. State*, 772 N.E.2d 476, 478 (Ind. Ct. App. 2002), *trans. denied* 783 N.E.2d 700 (Ind. 2002). The evidence establishing Vanderpool committed attempted murder – namely, that he took off at a high rate of speed and hit Officer Holding, knowing his arrest was imminent – also established he knowingly or intentionally resisted Officer Holding forcibly and operated a vehicle in a manner creating a substantial risk of bodily injury. *See* Ind. Code § 35-44-3-3(a)(1) and (b)(1)(B) (resisting law enforcement). Therefore, we vacate Vanderpool's convictions of criminal recklessness and resisting law enforcement as Class D felonies.

Affirmed in part and vacated in part.

VAIDIK, J., and MATHIAS, J., concur.